IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO. 706 OF 2004

IN

SUIT NO. 3709 OF 2003

Lok Housing & Constructions
Ltd., & Anr. .. Plaintiffs.

Vs.

Everest Industries
Ltd. .. Defendant.

And

Nirmal Lifestyles Ltd., .. Respondent.

Mr. Janak Dwarkadas, Sr. Counsel with Zal Andhyrujina i/by Udwadia Udeshi & Co. for plaintiffs.

Dr. Virendra V. Tulzapurkar with Firoz Palkhiwala i/by D.R. Mehta & Co. for Defendant.

Me. I. M. Chagla, Sr. Counsel with R. Chitnis i/by W. Gandhi & Co. for Respondent.

CORAM : S.U.KAMDAR,

DATE : 17th FEBRUARY, 2005.

ORAL JUDGMENT :

1. The present application is filed under Order 6 rule 17 of the Civil Procedure Code for amendment of the plaint in terms of the schedule which is set out to the said chamber summons. In nutshell, the facts of the present case are as under:

2. The original suit is filed against the Defendant Everest Industries Ltd., inter alia seeking the direction that they should give the 2nd plaintiff a fair opportunity to bid for the property by clarifying the ambiguities in the prescribed format of the required Bank guarantee and granting reasonable time thereafter to furnish such prescribed bank guarantee. It is further prayed that thereafter considering the 2nd plaintiff's offer should be considered and if the 2nd plaintiff's offer is the highest then the same should be accepted and necessary documents including the sale deed should be executed in favour of the plaintiff no. 2. By prayer (B) of the suit, a permanent order and injunction is sought restraining the original defendant from selling, giving for development, or in any manner transferring, disposing and/or dealing with the property till such time as the defendant furnishes the aforesaid particulars sought for in prayer (a) are furnished by him.

3. The plaintiff in the present case are the developers and are inter alia carrying out development of the land. The defendant is a company and the sole owner of land together with building and structure standing thereon at village Mulund (West), Bombay. Under an agreement dated 31.7.90 and 22.6.93 entered into by and between the plaintiff and the original defendant, the defendant permitted the 1st plaintiff to develop the residential land for consideration of total sum of Rs.37.15 crores on the terms and conditions set out therein. By a further agreement dated 27.7.1995, the defendant permitted the 1st plaintiff to develop the property for a total consideration of Rs. 30 crores on the terms and conditions set out in the said supplementary agreement dated 27.7.1995. On 16.3.1998, the defendant terminated the agreement dated 27.7.1995. In view thereof differences and disputes arose between the parties which were referred to arbitration. On 24.12.1999 a settlement was arrived at by and between the parties and on 29.3.2000, a consent award was passed by the Arbitrator.

4. It is the case of the plaintiff that in pursuance of the said award the defendant was obliged to carry out certain acts and deeds and

that the defendant failed and neglected to do so which resulted in plaintiffs further loss of about Rs. 50/- crores. In the meantime, the defendant filed an execution application No. 420 of 2002 in this Court for executing the said award passed by the Arbitrator. Immediately thereafter the plaintiffs also filed an execution application for executing the said award being Execution Application No. 11 of 2003. A chamber summons in execution was taken out being Chamber Summons No. 25 of 2003 in Execution Application No. 420 of 2002 by the plaintiff and sought various reliefs in respect of the obligations which they were required to comply with under the said award. Similar chamber summons was taken out by the plaintiff being Chamber Summons No. 1109 of 2003 in respect of the said award for execution. It is the case of the plaintiffs that during the pendency of the said proceedings the defendants intended to sell the property on 24.1.2003. The 2nd plaintiff wrote a letter seeking to purchase the property for Rs. 47.5 crores in accordance with the consent award. However, in July 2003, the defendants invited offers for purchase of the land on a limited tender basis and thus, accordingly, the plaintiff has filed the present suit inter alia seeking the aforesaid reliefs.

5. During the pendency of the present suit, the said property has been sold in favour of Nirmal Lifestyles Ltd., the respondent herein which is proposed to be impleaded as party defendant no. 2 in the present suit. By the same amendment, various other averments including the challenge to the said sale in respect of the said property has been sought to be added in the present suit. Thus, in effect this part of an amendment seeks to add the events which has taken place pending the present suit.

6. Mr. Janak Dwarkadas, the learned counsel appearing for the plaintiff in support of the chamber summons has submitted that the chamber summons should be allowed because it is merely incorporating the subsequent events which have transpired in the course of the pending suit. On the other hand, Mr. Chagla appearing for the respondent, being proposed defendant no. 2 has vehemently opposed and has contended that the present chamber summons should not be granted. He has submitted that though it is true that normally the approach of the Court for granting amendment should be liberal but in this case, the said chamber summons should not be granted as it is well settled that there are certain exceptions to the rule of liberal granting of the amendment. According to the learned counsel for the

respondent two grounds on which the present application should be dismissed are as under :-

a) That the proposed amendment is completely distinct and introduces a fresh and independent cause of action as against the proposed defendant and it is inconsistent to the existing pleadings in the suit and thus the amendment should not be granted.

b) The second contention raised by the learned counsel for the respondent that the amendment application should not be granted because the original suit as framed does not disclose any cause of action and that the defendants has already taken out the notice of motion for dismissal of the suit for non-disclosure of cause of action under Order 7 Rule 11 of the Code of Civil Procedure, 1908 and the same is pending. It has been contended that by virtue of the present application the plaintiff is seeking to bring in the cause of action which is absent in the original suit and thus, the chamber summons should not be granted as it will amount to take away existing right of the defendant to get the suit dismissed for non-disclosure of cause of action.

7. Dr. Tulzapurkar appearing for the

defendant has contended that the present chamber summons should be dismissed. According to him, the present chamber summons is useless and an exercise in futility and on that ground the same should be dismissed.

8. Having heard the parties at length in so far as the first contention is concerned, I am of the opinion that what is sought to be added and incorporated are the averments incorporating subsequent events which have transpired pending the present suit and are arising out of the very same transaction. It is true that the respondent is the subsequent purchaser of the property and is not a party to the present proceedings. However, the respondents have purchased the property knowing fully well the pendency of the suit and thus it cannot be contended by him that he should not be impleaded in the present proceedings because he is not concerned with the said suit. The subject matter of the property is identical both in the suit as well in the amendment proposed. The rights of the parties also flow from the original transaction and the award passed by the Arbitrator and the consent terms passed therein. Thus, it is not possible for me to accept that the present amendment is totally bringing distinct and different cause of action. In any case, the Apex Court in the case

of Ragu Thuilak D. John vs. S. Rayappan and others, reported in (2001) 2 SCC 472 has held that even inconsistent and new cause of action should be permitted to be incorporated and the only intention of the Court ought to be in granting or refusing to grant amendment is to avoid multifariousness of the proceedings. In view of the judgement of the Apex Court which is confirmed in the subsequent judgment of the Apex Court in the case of Pankaja And Another vs. Yellappa (Dead) by LRs. and others, reported in (2004) 6 SCC 415 I am not inclined to accept the first contention advanced by Mr. Chagla and I reject the same.

9. In so far as the second contention of the learned counsel is concerned that in view of the provisions of Order 7 Rule 11 of the CPC, the present chamber summons should be dismissed, it is suffice to state that identical issue arose before the Division Bench of this Court in the case of Aganmal Ramchand vs. The Hongkong & Shanghai Banking Corporation reported in AIR (37) 1950 Bom. 345, The Court in paragraph 3 of the said judgment has held as under :-

> (3) Now, apart from authority, turning to the scheme of the Civil Procedure Code, O.6, R. 17, is very wide in its terms

and it gives power to the Court to allow either party to alter or amend his pleadings in order that the real questions in controversy between them should be adjudicated upon. Mr. Seervai relies on O. 7, R. 11, which provides that the plaint shall be rejected in the cases mentioned in that rule and the one with which we are concerned is where it does not disclose a cause of action. Mr. Seervai's argument is that when a plant comes before the Court and that plaint does not disclose a cause of action, it is mandatory upon the Court to reject that plaint and dismiss the suit and the Court has no power to permit the plaint to be amended. In other words, Mr. Seervai's contention is that O.6, R.17, is controlled by O. 7, R.11, and in cases falling under O. 7, R. 11, the Court has no jurisdiction to order the amendment of the plaint. I am unable to accept that contention. I see no reason whatever why the power of the Court to allow amendment of pleadings should be in any way restricted or controlled by the provisions contained in O. 7, R.11. It is perfectly true that it is incumbent upon the Court to reject a plaint that

> does not disclose a cause of action, but it does not follow that it is not open to the Court to allow a plaint to be amended so that it should disclose a cause of action. It is only when a plaint does not disclose a cause of action that the Court is called upon to exercise its power under O. 7, R. 11. But the Court may prevent the operation of O. 7, R. 11, and may save the plaint being rejected by exercising its power under O. 6, R. 17, and allowing the plaint to be amended. It would indeed be an extraordinary proposition to lay down that if various averments had to be made in the plaint which would go to constitute a cause of action, and by some oversight or some mistake the plaintiff failed to make one of the averments, then in that case the plaint must be dismissed and the plaintiff could not apply for an amendment and make the necessary averment."

10. In view of the clear answer to the second contention by the Division Bench judgment of this Court, I do not propose to discuss the same in further details. The Division Bench judgment is binding on me and in view thereof I reject the

second contention advanced by Mr. Chagla.

11. In the circumstances, the Chamber Summons is made absolute in terms of prayer clause (a).

12. The learned counsel appearing for the proposed defendants seeks stay of the order. Stay granted upto 1st March, 2005.